No. 98-436

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,
Petitioners,
v.
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

REPLY BRIEF FOR PETITIONERS

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Invoking "the historical record" and "this Court's federalism jurisprudence," the State of Maine submits that the Fair Labor Standards Act (FLSA) provision for state employee overtime pay suits against the State in state court "is not a valid" federal law. Brief for Respondent (Resp. Br.) p. 7.

The FLSA is in all other respects a valid exercise of Congress' Article I legislative power and contravenes no "state sovereignty" limits on that power. The FLSA enforcement provision is not valid, then, *only* if there is a free-standing "state sovereign immunity" constitutional limit on Article I that is broader and more absolute than the "state sovereignty" limit thereon. Respondent seeks to derive such a limit from three related propositions:

1. That "one of the core attributes of sovereignty" is the sovereign's "immunity from a private damages action in its own courts," Resp. Br. 6;
2. That, by reason of this sovereign immunity doctrine, "at the time of the adoption of the Constitution, States were immune from suit from their own citizens in their own courts," *id.* at 14; and
3. That the Framers proceeded on the understanding that the "State sovereign immunity inherent in the concept of sovereignty . . . was unaffected by the Constitution," *id.* at 20.

That argument cannot be sustained. As we show in this reply, Respondent's submission proceeds on a studied refusal to acknowledge, much less to confront, the unprecedented transformation of "the concept of sovereignty" worked by the Constitution. That transformation has the most profound significance for the States' "immunity . . . in [their] own courts" as an "attribute[] of [their]

sovereignty." Thus, by reason of its omission, Respondent distorts both the 'historical record" provided by the ratification debates and the import of this Court's "federalism decision." [1]

1. *The Necessary Relation Between Sovereign Authority And Sovereign Immunity As An Attribute of Sover-*

[1] Two points on the nature of Respondent's submission are worthy of note at the outset.

(i) In our opening brief we argued first that if the FLSA is a constitutionally valid federal law, this Court's decision in *Howlett v. Rose*, 496 U.S. 358 (1990) demonstrates that state sovereign immunity rules cannot block the enforcement of federal rights in state courts when Congress has authorized such an enforcement action. We then argued that the FLSA *is* a valid federal law in that, apart from the Eleventh Amendment state sovereign immunity rule that limits federal court jursdiction, there is no constitutional state sovereign immunity barrier to Congress' power to provide for the enforcement against the States of a constitutionally proper enactment.

Respondent does *not* contest our first argument. Indeed, Respondent in discussing the force of the Supremacy Clause here, Resp. Br. 22-27, "readily agree[s] that state law must yield to consstitutionally valid federal lawss" in the state sovereign immunity area as in all others, *id.* at 22.

Respondent instead joins issue with us at the point of our second argument. And, in this reply we confine ourselves to the issue thus put into contention.

(ii) To gain motive power, throughout its submission Respondent frames the question as one of Congress' authority to "abrogate" state sovereign immunity. Resp. Br. 6, 7, 9, 14, *et seq.* That formulation all but assures the conclusion Respondent claims to be proving *viz.*, that there is a state sovereign immunity rule of constitutional dimension applicable here. For the "abrogation" doctrine applies to a situation in which it is settled that there is such a constitutional rule—the Eleventh Amendment state sovereign immunity rule—albeit a constitutional rule that is *not* applicable here. The question truely presented here comes one critical step earlier than the question in an "abrogation" doctrine case—whether there is any constitutional rule of sovereign immunity that limits Congress' Article I power to provide for private party enforcement auits against the State in state courts. That question should be considered on its own merits and not by confusing it with the "abrogation" doctrine question.

eignty. The concept of *sovereignty* denotes the ruling authority's exercise of its power over the body politic. From that starting point, the sovereign immunity rule constitutes an "attribute of sovereignty." In Justice Holmes' celebrated formulation, a "sovereign is exempt from suit on the ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

Under the constitutional plan, the States are, of course, sovereign in many regards but *not* in the regards enumerated in Article I as to which the United States is sovereign. As this Court "has frequently noted, the States unquestionably do 'retai[n] a significant measure of sovereign authority.' They do so however only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *U.S. Term Limits, Inc. v. Thorton,* 514 U.S. 779, 801-802 (1995) (*quoting Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)). Thus, in the federal union created by the Constitution, when Congress enacts a valid federal law, in which a federal right is made enforceable in state court, "the Supremacy Clause makes [that federal] law 'the suprame Law of the Land,' and charges state courts with a coordinate responsibility to enforce [it] according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. at 367.

Given the nature of the constitutional plan, in all those respects in which the States are supreme ruling authorities and act as such, their pre-existing state sovereign immunity continues to follow from the premise of undiluted state sovereignty.

But it is also plain—and that is of the essence here—that in another qualitatively different situation brought into being for the first time by the Constitution, that pre-existing state sovereign immunity does not obtain. That is

the situation in which Congress properly exercises its Artice I legislative power so as to extend a set of binding rules to the States, and in so doing provides for private party enforcement of those rules in the state courts—the very situation that gives rise to this case.

In this new situation the United States—and *not* the States—is the sovereign law-giver described by Justice Holmes. By the force of the Constitution, the United States has the supreme power to "make[] the law on which [the plaintiff's] right depends;" to make that law binding on all those covered thereby; and to make that federal law enforceable in state court. And, such a governing federal law preempts any contrary state law. It follows that when Congress so acts, the state sovereign immunity doctrine derived from state sovereignty can not be made to serve as a bar to enforcement of the state liability rule imposed by federal law.

2. *The Constitution And The Ratification Debates.* In creating the new federal union, the Framers might of course have created a new state immunity doctrine attuned to the new constitutional sovereignty regime—a doctrine that would have imposed an independent barrier to the exercise of Congress' otherwise inherent sovereign power to provide for the enforcement of the rights declared in its valid enactments through the normal processes of the law.

But there is no such provision in the constitutional text. And, nothing in the text, in the Constitution's structure or in the authoritative constitutional materials remotely suggests that the Framers intended to impose such a novel and disabling limitation on the United States as a sovereign.

Indeed, the ratification debates on the status of state sovereign immunity under the Constitution speak to an entirely different issue—that the creation of the *federal judicial power* through Article III of the Constitution might open the States to suit in federal court and do so in a manner that would undermine state sovereign immunity as an attribute of state sovereignty.

Those debates start from the point that the Constitution not only allocates certain sovereign authority to the United States but also subdivides that authority among the federal government's three branches. With respect to the judicial power, the provision of Article III § 2 extending that power to "Controversies between a State and Citizens of another State" raised an important question not without difficulty. As we have seen, state sovereign immunity clearly existed as an attribute of state sovereignty in state courts prior to the Constitution. And, after ratification, in all instances in which a plaintiff's case rested on state law, the States most certainly would retain such immunity in their own courts. But given the force of the sovereignty granted to the United States, and of the grant of an otherwise undefined federal judicial power over controversies involving a State, would such cases be justiciable in an Article IIII court, notwithstanding the State's continued sovereignty as the maker of "the law on which the [plaintiff's] right depends"?

The ratification debates on that question were framed by the general anxiety occasioned by the open-ended nature of the Article III authority to adjudicate cases coming within a head of federal jurisdiction. (Indeed, even the Madisonian compromise on the creation of the lower federal courts failed to eliminate Article III as a particular cause of controversy in the ratification process.) Against that background the Founders focused on the particular question of federal court suits on state obligations and on the interplay between federal sovereignty and state sovereignty where neither is clearly paramount. The fullest statement on the subject—Alexander Hamilton's Federalist 81—makes that clear.

As we noted in our opening brief, Pet. Br. 25, n.9, Hamilton begins by stating that he is taking up the "suggest[ion] that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation." The Federalist No. 81 (A. Hamilton) (C. Rossiter ed. 1961), 506. And, as Respondent's brief notes, Resp. Br. 20, Hamilton then goes on to state:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. * * * [T]here is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.

Thus, Hamilton is concerned with the scope and nature of the federal judicial power—and with that power alone—and his position is that adoption of Article III should not serve to negate state sovereign immunity with respect to claims based on state obligations incurred in the exercise of the State's sovereign authority—a sovereign immunity that would continue to obtain in state court. Nothing in Hamilton's description of the area of concern or in his response to that concern, lends support of any kind to Respondent's claim that the Framers intended to impose a free-standing state sovereign immunity constitutional

limit on Congress' exercise of *its* sovereign legislative power.[2]

In short, Respondent fails entirely to marshal any support in the Constitution or in the constitutional background that supports its thesis that there is a free-standing state sovereign immunity constitutional limit on Congress' Article I power.

3. *The Eleventh Amendment Jurisprudence.* In its search for secondary support for that thesis, Respondent rests heavily on the Eleventh Amendment and its state sovereign immunity principle, on the decisions elaborating on that principle and on the "anomalies" that would allegedly result if that principle did not govern with regard to federal right suits in state court. None of these supports can take the weight Respondent would put on it.

(a) The Eleventh Amendment was the product of a clearly focused concern—that the Article III federal judicial power might subject the States to suits in the federal courts, and most particularly to suits on state obligations of the kind that established state sovereign immunity doctrine had precluded and would continue to preclude in state court. That was the concern that had roiled the ratification debates; that was the concern that *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) reactivated; and that was the concern—and the only concern—the Eleventh Amendment addressed.

Given this background, and despite the fact that the Eleventh Amendment law has not otherwise been a model

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[2] The other materials assembled at Resp. Br. at 20, were equally directed to the Article III federal judicial power, and not to Congress' Article I legislative power. See *Hans v. Louisiana*, 134 U.S. 1, 14 (1890) (recognizing that the Marshall and Madson ratification debate commentaries are directed to the proper limit on the federal judicial power).

of stability, the Court has recognized from the first that the Eleventh Amendment has one office and one office only—to delimit the federal judicial power and the jurisdiction of the federal courts. As the Court emphasized in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), "the text of the Amendment itself is clear enough on this point: 'The Judicial Power of the United States shall not be construed to extend to any suit . . .'. And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects 'the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97198 (1984)." 517 U.S. at 64 (ellipses and brackets in original); see also, *id.* at 68, 72-73. And precisely because the Eleventh Amendment is so limited, the Court has "stated on many occasions, 'the Eleventh Amendment does not apply in state courts,' *Will* [*v. Michigan Dept. of State Police*,] 491 U.S. at [58] 63-64 [(1989)], citing *Maine v. Thiboutot*, 448 U.S. 1, 9, n.7 (1980); *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979)." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 204-205 (1991).

Indeed, this Court has continuously treated on the merits with private party state court cases against a State raising a federal claim. In so doing the Court has not even suggested that the suit is foreclosed by the Eleventh Amendment itself or by any general constitutional state sovereign immunity principle. And, that is true with regard to the state court cases cited at Resp. Br. 36, that were in the same legal form as *Hans v. Louisiana*, 134 U.S. 1 (1890)—*viz.* cases on state obligations raising federal impairment of contract claims.[3] That these cases

[3] In *Beers v. Arkansas*, 61 U.S. 527 (1858), the Court rejected on the *merits* the bondholder's claim that a newly enacted state law, which modified the State's prior waiver of immunity by imposing an additional procedural requirement in any suit to collect interest on the bond, worked an unconstitutional impairment of contract:

> But the prior law was not a contract. It was an ordinary Act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterward, if upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law . . . [61 U.S. at 529.]

Railroad Co. v. Tennessee, 101 U.S. 337 (1879), is to the same effect. There, the State had consented to suit on certain obligations, but not to enforcement of any resulting judgments. When the State law permitting such adjudications was repealed, the creditors brought suit claiming an unconstitutional impairment. The Court rejected this claim on the merits: "it is clear, therefore that the right to sue, which the State of Tennessee once gave its creditors, was not in legal effect, a judicial remedy for the enforcement of contracts, and that the obligation of its contracts were not impaired, within the meaning of the prohibitory clause of [federal constitution] by taking away what was thus given." *Id.* at 341.

See also the related case of *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1838), where the Court rejected on the *merits* the claim that notes of the Bank of Kentucky were bills of credit "omitted by the state in violation of the Constitution of the United States." *Id.* at 311.

Beers, Railroad Co. and *Briscoe*—all leading cases—are crystalline in this regard. But this is not to suggest that every nineteenth century case in this Court concerning disputes on state obligations is similarly transparent. While not cited by Respondent, there is to our knowledge the somewhat opaque decision in *Louisiana ex rel N.Y. Guar. & Indem. Co. v. Steele*, 134 U.S. 230 (1890). The Court there affirmed a state court judgment dismissing a private party action against a state auditor for a decree compelling the auditor to levy a tax. The action, the Court said, was in substance one against the State (which had not been made a party) and, in the words of the appellee, sought to compel the State to perform "an act of sovereignty that can only be performed by the legislative department of the government." *Id.* at 230. *Cf. New York v. United States*, 505 U.S. 144 (1992).

have gone on the merits is especially significant. For *Hans* is the fountain head of the rule that the Eleventh Amendment precludes federal court jurisdiction over cases

bottomed on federal law, as well as federal court jurisdiction over cases bottomed on state law.

It is significant too, as we stressed in our opening brief, that *Seminole Tribe* confirms that the Eleventh Amendment and the Eleventh Amendment state sovereign immunity principle speak to the metes and bounds of the Article III federal judicial power and to that alone. The *Seminole Tribe* Court held:

> Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. *The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.* [517 U.S. at 72-73 (emphasis added) (footnote omitted).]

Seminole Tribe's holding thus rests on the Eleventh Amendment restriction of Article III judicial power *conjoined* with the Constitution's "separation of power" rule that Congress has no Article I authority to expand the federal jurisdiction stated in Article III. *Seminole Tribe* does *not* rest on any direct general constitutional state sovereign immunity limit on Congress' Article I legislative power.[4]

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[4] In *Seminole Tribe* the Court, in responding to Justice Souter's point in dissent that its reading of the Eleventh Amendment would permit States to disregard federal law, provided the following list of methods by which state compliance could be achieved: suits in federal court by the federal government; actions by individuals against state officers under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908); and review in this Court from state court decisions where a State has consented to suit. 517 U.S. at 71 n.14. Respondent would make that list into an authoritative ruling that Congress has no Article I authority to provide for private party state court enforcement of federal law. Resp. Br. at 9-10. But the *Seminole Tribe* statute did not provide for private party state court suits against a State and thus did not remotely present any issue regarding Congress' Article I power or any supposed direct, general constitutional state sovereign immunity limit on that power. And, of course, the *Seminole Tribe* holding makes it plain that the Court did not rule that there is any such limit on Congress' Article I power. Given this context, Respondent greatly overreaches in its effort to convert an incidental, and evidentially non-exhaustive, list into a binding and comprehensive precedential ruling.

Seminole Tribe thus stands in striking contrast to *General Oil Co. v. Crain*, 209 U.S. 211 (1908), (cited in our opening brief but not even alluded to by Respondent). In *Crain*, a state court action on a federal claim, this Court reversed the state court's refusal on the basis of a sovereign immunity defense to entertain that federal claim. The Court emphasized that if the Eleventh Amendment barred a suit in federal court, and state sovereign immunity were permitted to bar the same suit in a state court, an easy and improper way would be open to prevent the enforcement of federal rights. *Id.* at 226.[5]

(b) To be sure this Court's Eleventh Amendment jurisprudence rests on what the Court has termed a "background principle of state sovereign immunity" that is "rooted in a recognition that the States, although a union maintain certain attributes of sovereignty, including sovereign immunity," and that provides that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe*, 517 U.S. at 54 & 72 (internal quotations omitted).

But here again the Court has made it plain that these statements of the state sovereign immunity principle are

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[5] The federal right in question in *Crain* was a right claimed under the Fourteenth Amendment, while here the right claimed is one under a federal statute. But there is no difference, either in principle or in the applicabilty of the Supremacy Clause, with rspect to the validity of state court reliance on state sovereign immunity as a defense.

Eleventh Amendment specific and are not statements of a general constitutional principle. As *Nevada v. Hall* 440 U.S. 410 (1979), puts the matter:

> The language used by the Court in cases construing [the Eleventh Amendment's] limits, like the language used during the debates on ratification of the Constitution, emphasized the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent. But all of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts. [*Id.* at 420.]

That being so, said the Court,

> These decisions do not answer the question whether the constitution places any limit on the exercise of one State's power to authorize its courts to assert jurisdiction over another State. Nor does anything in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this court to impose limits on the powers of California [to assert such a jurisdiction]. [*Id.* at 420-21 (footnotes omitted).]

By the same token the Eleventh Amendment state sovereign immunity decisions do *not* answer the question of whether the Constitution places any direct limit on Congress' Article I power to provide for the enforcement of a valid federal enactment binding on the State through state court private party suits. This question is entirely distinct from the Article III federal judicial power question treated in those Eleventh Amendment cases. Moreover, the question is equally distinct from the question of an independent sovereign's immunity in its courts as an attribute of its sovereignty that was treated in the English common law and the general law of nations at the time of the framing of the Constitution.

(c) In addition to seeking to make these direct uses of the Eleventh Amendment and the Eleventh Amendment cases, Respondent seeks to leverage the Eleventh Amendment state sovereignty principle into a general constitutional limit on the federal government. In this regard, Respondent argues that such a limit is necessary to preclude "the anomalous result in which *state* courts are the only forum for private enforcement of a federal statutory right." Resp. Br. 24 (emphasis in original).

We agree that as a matter of abstract logic this result is not the most obvious, the simplest or the most straightforward. But in no way that matters can it be regarded as anomalous.

The constitutional plan for the division of sovereignty between the United States and the States, for the subdivision of federal sovereignty among the three branches of government, and for the dual role of the state courts in the enforcement of the full corpus of our law is not obvious, simple, or straightforward in any of its aspects. Nor is it one that grants all power to the United States or that provides for absolute state autonomy.

Given the totality of the plan—and especially the recognition of the particular sensitivity of federal court suits against a State—it is not at all anomalous that valid federal laws can be enforced against the States in private party state court suits but not in private party federal court suits. That is the result that most fully captures the logic of the plan. It gives Congress' sovereign powers their due and it does so in a way that protects the States from being subject against their will to the exercise of

the federal judicial power. And, it recognizes the special place of the States in the federal union by providing that the States alone have the special protection of being amenable to private party suits on federal claims in their own courts.

Indeed, we think it fair to say that the real anomalies reside in the result that Respondent advocates—that federal rights declared in valid federal laws binding on the States cannot constitutionally be made enforceable by the private party right holder.

It would, first of all, be anomalous to read into the Constitution an unprecedented state sovereign immunity limitation on Congress' law making power when nothing in the Constitution's text, structure, or history provides any support for that reading. And it would be especially anomalous to so constrain Congress' Article I power in the name of federalism when this Court has long recognized Congress' power to make valid federal laws binding on the States enforceable through federal court suits brought by the United States. On any view of State autonomy, such a federal court suit by the United States is more intrusive than a private party state court suit. Finally, it would be anomalous to deny Congress the ability to confer on federal right holders the independent power to enforce their rights and to make them entirely dependent on the Executive Branch for the vindication of those rights. It is Respondent's effort to invalidate the congressional law making power exercised here, not the proper recognition of the legitimacy of that power, that creates anomalies.

4. *Respondent's "Commandeering" and State Court Jurisdiction Arguments.* Both Respondents and its *amici*, the National Conference of State Legislatures, *et al.*, suggest that the Maine courts lack "jurisdiction"—or are not

"courts of competent jurisdiction"—to entertain FLSA private party overtime pay suits because state sovereign immunity is a "neutral state law" which limits the courts' jurisdiction. Resp. Br. 44; State Leg. Br. 6 n.6, 22.

Howlett v. Rose is squarely to the contrary. *Howlett* explained that state rules "denominated jurisdictional" do not "provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." 496 U.S. at 381.

Here, the Maine Superior Courts are courts of general jurisdiction with power to entertain suits against the State. Thus, the Maine sovereign immunity rule barring federal statutory claims is *not* one that goes to the Superior Court's jurisdiction or competence.[6]

The contention that a federal law providing for state court private party FLSA enforcement suits "raises the specter of the federal government improperly 'commandeering' the States," Resp. Br. 2, State Leg. Br. 12-15, likewise fails to do business with this Court's precedents.

The Supremacy Clause itself imposes a direct and specific duty on state adjudicatory tribunals to enforce valid federal laws, a duty that, given the Madisonian compromise, is central to the constitutional plan and the enforcement of federal law. *Idaho v. Coeur D'Alene Tribe of*

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[6] Whatever can be read into the one paragraph per curiam decision in *Georgia Railroad & Banking Co. v. Musgrove*, 335 U.S. 900 (1949), cited at Resp. Br., 44, it cannot be the proposition that a taxpayer alleging an unconstitutional exaction can be denied, on sovereign immunity grounds, any forum in which to obtain a remedy. That proposition was rejected in *Reich v. Collins*, 518 U.S. 106 (1994), which recognized that state sovereign immunity defenses to federal claims must give way in state courts even if the Eleventh Amendment would bar such claims in federal courts.

Idaho, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J.).

That being so both of this Court's "anti-commandeering" principle decisions specifically recognize the constitutionally mandated duty of the state courts to enforce federal law. *Printz v. United States*, 521 U.S. 898, 907 (1997) ("the Constitution permit[s] imposition of an obligation on state judges to enforce federal proscriptions"); *New York v. United States*, 505 U.S. at 178 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."). *Printz* and *New York*, then, rather than putting into question the crucial role of state courts in enforcing federal rights, underscore that role.

5. *The Testa v. Katt Non-Discrimination Principle.* Respondent's first counter to our argument that the decision below violates the principle that state courts may not selectively close their doors to federal claims is that the point was not properly raised and preserved below. Resp. Br. at 41. That is not so. As we showed in our reply brief in support of the *certiorari* petition, the non-discrimination point was properly raised and fully briefed to the court below. Appellants' Brief, J.A. at 62, 71-77; Brief for U.S. as Amicus Curiae, J.A. at 136-140; Appellants' Reply Brief, J.A. at 155-157. And, the Maine Supreme Judicial Court reached that point—albeit by characterizing it as a "waiver" argument—and rejected it on its merits and not on any procedural ground. Pet. App. 6a-7a; Reply Br. at 3-4.

As to substance, Respondent makes two basic points: that the non-discrimination principle of *Testa v. Katt*, 330 U.S. 386 (1947), is not offended here because the state court bar does not rest on "any disagreement with the

policy of the FLSA," Resp. Br. at 44; and because the state courts entertain state causes of action against the State which are only analogous, but not identical, to the Petitioners' federal FLSA claim. Resp. Br. at 46-48. Both points are wide of the mark.

The State's motive in denying federal claimants access to its courts is beside the point. The relevant inquiry is an objective one which turns on whether the state courts entertain state causes of action which are of the "same type" or "analogous" to the barred federal causes of action. *Testa v. Katt*, 330 U.S. at 394; *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n. 1 (1982).

Nor do *Testa* and *F.E.R.C.* require the federal cause of action to be identical to a state cause of action heard by the state courts for the non-discrimination principle to apply. *See Testa*, 330 U.S. at 394; *F.E.R.C.*, 456 U.S. at 776 n.1.

The state employee statutory wage claims routinely heard by the Maine courts are of the "same type" as Petitioners' federal claims. The non-discrimination principle therefore applies even if Maine law does not provide for overtime pay at the federally mandated premium wage rate.

CONCLUSION

For the foregoing reasons the decision and judgment of the Maine Supreme Judicial Court should be reversed.

Respectfully submitted,

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